

**\*E-FILED 1/15/2008\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

No. C07-03798 JW (HRL)

Plaintiff,

**ORDER GRANTING IN PART  
DEFENDANT'S MOTION FOR  
PROTECTIVE ORDER**

v.

KENNETH L. SCHROEDER,

**[Re: Docket No. 18]**

Defendant.

On January 15, 2008, this court heard the motion for protective order filed by defendant Kenneth L. Schroeder. The Securities and Exchange Commission (SEC) opposed the motion. Upon consideration of the papers filed by the parties, as well as the argument of counsel, this court grants the motion in part.

**I. BACKGROUND**

This is a civil enforcement action for alleged improper stock option backdating at KLA-Tencor. Defendant Kenneth Schroeder is KLA-Tencor's former Chief Executive Officer. The SEC contends that he was a key participant in a fraudulent scheme to backdate stock options, resulting in the concealment of millions of dollars in executive and employee compensation and significant overstatement of the company's income.

Before filing the instant action, the SEC and the Department of Justice (DOJ) investigated KLA-Tencor's option granting practices. In the course of its investigation, the

1 SEC obtained memoranda of approximately 55 witness interviews conducted by counsel for a  
2 Special Committee of KLA-Tencor's Board of Directors. The Special Committee also  
3 interviewed Schroeder on September 1, 2006; and, that interview was recorded in a 73-page  
4 memorandum. The SEC produced these memoranda to Schroeder as part of its initial  
5 disclosures in the instant action.

6 The DOJ's investigation of KLA-Tencor is ongoing. Although he has not yet been  
7 indicted, Schroeder says that the U.S. Attorney's Office has advised that he is a possible target  
8 of the investigation and that criminal charges have not been ruled out.

9 Discovery is set to close on March 31, 2009. The SEC has noticed Schroeder's  
10 deposition for February 5, 2008. Schroeder now seeks a protective order precluding the SEC  
11 from deposing him until the last three months of discovery – that is, no earlier than January  
12 2009. He argues that, by noticing his deposition early in discovery, the SEC is trying to force  
13 him to prematurely choose between testifying or asserting his Fifth Amendment rights (and,  
14 consequently, risking the possibility of having adverse inferences drawn against him). The SEC  
15 argues that Schroeder's Fifth Amendment concerns are merely speculative because he has not  
16 been indicted and it is not clear when, or if, he will face criminal charges. It further asserts that  
17 the government and public have an overriding interest in the expeditious resolution of these  
18 proceedings and that it will be prejudiced if Schroeder cannot be deposed until the very end of  
19 the discovery period.

## 20 II. DISCUSSION

21 “The Constitution does not ordinarily require a stay of civil proceedings pending the  
22 outcome of criminal proceedings.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324  
23 (9th Cir. 1995) (citing *Federal Savings & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th  
24 Cir. 1989)). Absent substantial prejudice to the parties involved, simultaneous parallel civil  
25 and criminal actions are unobjectionable. *Id.* Nonetheless, a court may exercise its discretion  
26 to stay civil proceedings when the interests of justice so require. *Id.* “The decision whether to  
27 stay civil proceedings in the face of a parallel criminal proceeding should be made ‘in light of  
28 the particular circumstances and competing interests involved in the case.’” *Id.* (quoting

1 *Molinaro*, 889 F.2d at 902). In making its determination, the court should consider several  
2 factors, including: (1) the extent to which the defendant's Fifth Amendment rights are  
3 implicated; (2) plaintiff's interests in proceeding expeditiously with the litigation; (3) the  
4 burden which any particular aspect of the proceedings may impose on the defendants; (4) the  
5 convenience of the court in the management of its cases, and the efficient use of judicial  
6 resources; (5) the interests of persons not parties to the civil litigation; and (6) the public's  
7 interest in the pending civil and criminal litigation. *Id.* at 325.

8 In the instant case, as discussed above, no criminal charges have been brought against  
9 Schroeder. "The case for staying civil proceedings is 'a far weaker one' when '[n]o indictment  
10 has been returned[, and] no Fifth Amendment privilege is threatened.'" *Molinaro*, 889 F.2d at  
11 903 (quoting *Securities & Exchange Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.  
12 D.C. 1980)).

13 However, Schroeder does not request a stay of the instant action or even of all  
14 discovery. Instead, he seeks the less drastic relief of having his deposition postponed so that he  
15 may make a more informed decision as to whether to assert his constitutional rights. He has  
16 made some showing as to the possibility of criminal indictments and advises that the DOJ has  
17 requested and obtained a tolling agreement as to any criminal charges which may be brought.  
18 (*See* Coopersmith Decl., ¶ 5). And, there is no dispute as to the significant overlap between the  
19 instant action and the subject matter of the DOJ's ongoing investigation of KLA-Tencor. This  
20 court is not persuaded that the instant action will be unduly delayed or hampered if Schroeder's  
21 deposition is postponed for a time. *See, e.g., Securities & Exchange Comm'n v. Power*  
22 *Securities Corp.*, 142 F.R.D. 321, 323 (D. Co. 1992) (granting defendant's request to postpone  
23 his deposition until after the time when the grand jury reached a decision as to indictments);  
24 *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 482 (N.D. Cal. 1987) (denying defendant's  
25 request to stay civil action where no indictments had been filed, but directing the parties to  
26 nonetheless develop a discovery plan that would be least likely to intrude on defendants' Fifth  
27 Amendment rights).

1 At the same time, however, the court is not persuaded that the SEC should be precluded  
2 from deposing Schroeder for a year until the very end of discovery. The SEC acknowledges  
3 that, by virtue of the Special Committee interview memoranda, it does have some inkling as to  
4 what Schroeder and other witnesses may have to say. Nevertheless, the memoranda in question  
5 apparently are not sworn testimony, but rather, attorney summaries of what witnesses said.  
6 Assuming Schroeder elects to testify substantively, his testimony might well point to the need to  
7 take other or further discovery. Moreover, there currently is no indication as to when the DOJ's  
8 investigation will be completed or if any criminal charges will be filed. And, Schroeder readily  
9 acknowledges that the SEC is entitled to depose him and that he may well have to choose  
10 between testifying and asserting his Fifth Amendment rights at some point.

11 Under the circumstances presented, this court concludes that an appropriate balance will  
12 be achieved if Schroeder's deposition is postponed for four months.

### 13 III. ORDER

14 Based on the foregoing, IT IS ORDERED THAT defendant's motion for protective  
15 order is GRANTED IN PART. His deposition shall be postponed until after May 15, 2008.

16 Dated: January 15, 2008

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19 HOWARD R. LOYD  
20 UNITED STATES MAGISTRATE JUDGE  
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**5:07-cv-3798 Notice has been electronically mailed to:**

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